(1) Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1999

NATIONAL LOAN INVESTORS, L.P.,

Petitioner,

- against -

TOWN OF ORANGE; ARTHUR WILLIAMS and WATER POLLUTION CONTROL AUTHORITY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS

QUESTIONS PRESENTED FOR REVIEW

1. Does 12 U.S.C. § 1825(b)(3) bar the imposition of penalties against real property held by the FDIC as mortgagee?

2. Do the protections afforded to the FDIC by 12 U.S.C. § 1825(b)(3) inure to the benefit of its assignees and/or successors in interest?

3. Did the lower Courts err in finding that National Loan Investors, L.P., as assignee of the FDIC, was responsible for the penalty charge of $114,127.57 imposed during the FDIC's receivership?

THE PARTIES TO THE PROCEEDING

The caption of the case contains all the parties to the proceeding.

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OPINIONS OF THE COURTS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported below at 204 F.3rd 407 (2nd Cir. 2000).

THE BASIS FOR JURISDICTION IN THIS COURT

The Judgment of the Court of Appeals was entered on February 25, 2000. The order of the Court of Appeals denying the timely motion for rehearing was entered on March 31, 2000.

This Court has jurisdiction to review the judgment of the Appellate Court by writ of certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of 12 U.S.C. § 1825 (b)(3). The statute is set forth in the Appendix.

STATEMENT OF THE CASE

On February 16, 1999, judgment was entered in the United States District Court for the District of Connecticut against National Loan Investors, L.P. (the "Petitioner" or "NLI") and in favor of The Water Pollution Control Authority (the "Respondent" or "W.P.C.A.") on the issue of damages. Judgment entered in favor of Petitioner on the issue of whether the contested charge, which was imposed by the Respondent under the authority of Conn. Gen. Stat. § 7-249, constituted a penalty within the meaning of 12 U.S.C. § 1825 (b)(3). (Pet. A-11-A12). The District Court entered judgment after a full trial on the merits and in reliance on a set of stipulated facts.

The District Court heard evidence concerning Petitioner's claim that 12 U.S.C. § 1825 (b)(3) shielded it, as an assignee of the FDIC, from liability for penalties assessed by the Respondent

under C.G.S. § 7-249 against real property that had been transferred to Petitioner. Specifically, Petitioner claimed that because 12 U.S.C. § 1825 (b)(3) prevented the assessment of penalties against the FDIC during the time the FDIC held the subject property, Petitioner, as assignee of the FDIC's interest, was not responsible for payment of those penalties during that limited period of time. The Respondent argued that the contested charge was not a penalty, and that Petitioner was therefore liable for payment of the charge.

Petitioner acquired its interest in the subject real estate by virtue of an assignment of mortgage from the FDIC as Receiver for a failed financial institution. At the time Petitioner acquired its interest, a foreclosure action commenced by the FDIC was pending. Petitioner thereafter substituted itself and foreclosed the mortgage to the property. Upon taking title, Petitioner paid to Respondent interest at the bond rate of 7.64% in the amount of $100,186.63. However, Respondent had imposed an additional 18% charge in the amount of $135,575.40. Petitioner contested payment of a portion of that sum in the amount of $114,127.57, which sum had been assessed against the property from November 14, 1991 through August, 1997, the period in which the FDIC held the beneficial interest in the property as mortgagee. When Respondent refused to waive those fees, Petitioner commenced its action in the United States District Court.

Following trial, the District Court ruled that the contested charge imposed by Respondent constituted a penalty. (A11-A12). However, the Court further held that because the FDIC never held absolute title to the property, but rather held only a mortgage interest, the assessment of penalties during the time the FDIC was Receiver did not violate the statute. (A14; A16). Following this ruling, the Plaintiff filed its Notice of Appeal on March 5, 1999. On March 12, 1999, the Respondent filed a Notice of Cross Appeal. On February 25, 2000, the United States Court of Appeals for the Second Circuit issued its Decision affirming the District Court's decision. (A20). On March 8, 2000, the Petitioner filed a timely Petition for Panel Rehearing. That Petition was denied by order dated March 31, 2000. (A55-A56). The present Petition for writ of certiorari followed.

REASONS FOR ALLOWANCE OF THE WRIT

1. Important Questions Of Federal Law Have Been Decided That Have Not Been, But Should Be, Decided By This Court.

An important question involving interpretation of 12 U.S.C. § 1825(b)(3) has been decided by the District and Appellate Courts which demands review by this Court. By ruling that 12 U.S.C. § 1825 (b)(3) did not bar the assessment of penalties against the subject real estate during the time that the FDIC held the beneficial interest in the property, these Courts have seriously undermined the purpose and policy behind the Federal Institutions Reform, Recovery and Enforcement Act ("FIRREA") as well as the public policy it was designed to promote. Moreover, the fact that these Courts have ruled that a mortgage interest is not an interest in property is significant and contrary to established precedent.

12 U.S.C. § 1825(b)(3) is an integral part of FIRREA. This provision of the statute prevents local taxing authorities from forcing the FDIC to pay penalties resulting from the failure of any person to pay property taxes. Irving Indep. School Dist. v. Packard Prop., 970 F.2d 58, 62 (5th Cir. 1992). Specifically, § 1825(b)(3) exempts the FDIC from any payments "in the nature of penalties or fines" resulting from "the failure of any person to pay personal property tax." Id. at 61-62; The County of Fairfax, Virginia v. FDIC, 1993 WL 62247, *1, *3 (Dist. of Columbia, Feb. 26, 1993). This provision is designed to protect the value of assets coming into the FDIC's possession and, by extension, the FDIC's ability to sell those assets.

A number of federal courts have expressly held that the protections afforded by other provisions of FIRREA should and do extend to assignees of the FDIC in order to bolster the FDIC's ability to liquidate assets and to promote the public

policy associated therewith. In fact, at least one District Court, the United States District Court for the Eastern District of New York, has specifically held that the protections contained in 12 U.S.C. § 1825(b)(3) inure to the benefit of an assignee. Beal Bank, SSB v. Nassau County, 973 F. Supp. 130 (E.D.N.Y. Aug. 5, 1997).[1] In addition, a number of courts have held that the federal banking regulations can be applied for the benefit of an assignee, purchaser or successor in interest of the FDIC. Id. at 133 (*citing* Federal Savings & Loan Insurance Corp. v. Griffin, 935 F.2d 691, 698 (5th Cir. 1991)). It has been expressly stated that "The failure to extend § 1825(b) defenses to assignees of the [FDIC] would emasculate [the policy to encourage purchasers to acquire assets of the FDIC] and serve to weaken the [FDIC's] ability to dispose of failed bank assets." Federal Deposit Insurance Corporation v. Bledsoe, 989 F.2d 805, 811 no7 (5th Cir. 1993); *citing* Federal Deposit Insurance Corporation v. Newhart, 892 F.2d 47, 50 (8th Cir. 1989). Clearly, by ruling as they did the District and Appellate Courts have decided an important question decidedly not in accord with the logical extension of FIRREA precedent. (See, e.g., Carrolton-Farmers' Branch Independent School District v.

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[1]In Beal Bank, SSB, 973 F. Supp. 130 (EDNY 1997) prior to the FDIC's Receivership of a mortgage on real property, Nassau County placed tax liens on the property and sold the liens to Medcor. After the sale of the tax liens, the FDIC was appointed as Receiver for the Dry Dollar Dock Bank and it assumed control over the Bank's assets, including a mortgage on the property. Medcor sent a Notice to Redeem to the FDIC, but it failed to respond. Id. After the statutory redemption period expired, the title to the property vested in Medcor, without the consent of the FDIC. Subsequently, the FDIC, assigned its mortgage interest in the property to the plaintiff, Beal Bank. In Beal Bank, the District Court stated that "it is axiomatic that an assignee takes all of the rights of the assignor, no greater and no less." Id. at 134. "An assignee becomes 'subject to all of the equities and burdens to property assigned because he receives no more and can do no more than his assignor.'" Id. (*citing*, State Bank of India v. Walter E. Heller & Co., 655 F. Supp. 326 (S.D.N.Y. 1987)).

Federal Deposit Insurance Corporation, 776 F. Supp. 1180, 1186)(N.D. Texas, 1991)(§ 1825(b)(3) shields the FDIC-Receiver from personal liability for penalties during the term of its receivership).

In the case at bar, the District Court expressly found that the contested charge imposed by the Respondent constituted a penalty. By holding that the contested charge could be lawfully assessed against the subject property during the FDIC's receivership despite ruling that the charge was a penalty, the Courts' rulings stand in direct contrast to the express language of § 1825(b)(3). Presumably, the rationale for this holding was predicated on the District Court's further finding that a mortgage interest is not an interest in real property. However, it is settled law that a mortgage interest is an interest in property. City of New Brunswick v. United States, 276 U.S. 547 (1928); Matagorda County v. Russell Law, 19 F.3d at 215, 221 (5th Cir. 1994).

As supported by the clear weight of the authorities, as well as the plain meaning of the statute, a lien interest on real property held by the FDIC is considered to be "property" within the meaning of the statute. The Fifth Circuit Court of Appeals addressed this very issue in Matagorda County v. Russell Law, 19 F.3d at 215. The Matagorda Court expressly held that"[i]t has been well settled law since 1928 that in the context addressed herein, 'property' embraces both fee and lien interest." Id. at 221 (*string citations omitted*). And further, that there is "no basis in law . . . for treating mortgage interests of federal instrumentality's different from other property of the United States." Id. at 221 (*citing*, Rust v. Johnson, 597 F.2d 174 (9th Cir. 1979), *cert. denied*, 444 U.S. 964 (1979)). This interpretation was expressly approved in Simon v. Cebrick, et al., 53 F.3d 17 (3rd Cir. 1995), in which the United States Court of Appeals for the Third Circuit stated: "We agree that the term 'property' in § 1825(b)(2) encompasses all forms of interest in property, including mortgages and other liens." Id. at 21.

Under § 1825, therefore, mortgage interests acquired by the FDIC are protected to the same extent as actual ownership interests in property. Thus, in this case, the mortgage interest held by the FDIC (and, by extension, the Petitioner) was clearly an

interest in property and as such was protected by § 1825(b)(2). It is clear that the District and Appellate Courts' determination that the penalties were properly assessed during the FDIC's receivership was in error. The Court expressly ruled that the eighteen percent (18%) fee charged by the W.P.C.A. was a penalty. In fact, the very invoices produced by the W.P.C.A. identified the charge at issue as a "penalty." (Plaintiff's Trial Exhibits P-1, P-2, P-3). Thus, the charges levied against the property *during the FDIC's Receivership* fall within the purview of § 1825 and are unlawful. The untenable position taken by the District Court and upheld by the Appellate Court has potentially far reaching ramifications on the future of real property, collection and commercial law. If assets coming into the FDIC's possession are devalued by private investors' inabilities to assert the protections of FIRREA, the FDIC's ability to transfer those assets will be jeopardized, as will the collection of defaulted loans. Accordingly, for all of the foregoing reasons, this issue is ripe for review by this Court.

2. There Is A Conflict Among the Circuit Courts Of Appeal On This Important Issue That Requires This Courts' Review.

The question of whether the protections of FIRREA, including those of Section 1825(b)(3), apply to an assignee of the FDIC is an important one on which there exists a conflict among the Circuits. Due to the prevalence of this issue before the District and Appellate Courts, the split of authority in the Circuits and the significance of this issue to the FDIC and private investors, this Court should issue a dispositive ruling on the matter. See, American Federation of Musicians v. Wittstein, 379 U.S. 171, 179 (1964).

The Fifth Circuit has considered the question of whether aspects of FIRREA extend to assignees of the FDIC. Federal Deposit Insurance Corporation v. Bledsoe, 989 F.2d 805 (5th Cir. 1993). In Bledsoe, the Fifth Circuit Court of Appeals held that assignees of the FDIC step into the shoes of the assignor and

derive by virtue of the assignment the benefits of FIRREA. The specific issue considered was whether an assignee obtained the benefit of the extended statute of limitations contained in the federal statute. The Bledsoe Court found that it did.

In Bledsoe, the defendant argued that FIRREA's six year statute of limitations did not extend to the assignee of the FDIC because 12 U.S.C. § 1821 was silent as to the assignee's rights. The court, however, in an extensive review of the law, determined that since the statute was silent as to the assignee's rights, it must look to the common law. Id. at 810. The Bledsoe Court reasoned that the protections should be transferred to the FDIC's assignee since under the common law, "an assignee stands in the shoes of its assignor, deriving the same but no greater rights and remedies than the assignor possessed, (citation omitted), **the statute of limitations continues to run against the assignee as it had against the assignor before.**" (Emphasis added). Id. The Eighth and D.C. Districts have ruled accordingly. Fox-Greenwald Sheet Metal Co., Inc. v. Markowitz Bros., Inc., 452 F.2d 1346, 1358 n. 69, 147 U.S. App. D.C. 14 (1971); FDIC v. Newhart, 892 F.2d 47 (8th Cir. 1989).

However, despite the foregoing, the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of Virginia, have ruled that the protections of FIRREA do not inure to the benefit of an assignee of the Resolution Trust Corporation. Federal Financial Co. v. Hall, 108 F.3d 46 (4th Cir. 1997); WAMCO III, Ltd. v. First Piedmont Mortgage Corp., 856 F. Supp. 1076 (E.D. Va. 1994);. Under the analysis in WAMCO and Hall, the Fourth Circuit has held that the right to the extended statute of limitations contained in FIRREA was personal and therefore, not transferable under common law principles. Federal Financial, 108 F.3d at 49-50 (4th Cir. 1997); WAMCO III, 856 F. Supp. at 1086 (*citing* 6A C.J.S. Assignments § 76).

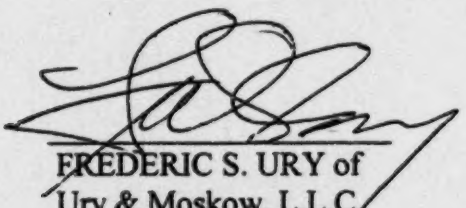
In the case at bar, NLI became a successor in interest after purchasing the mortgage on the Subject Property from the FDIC. Accordingly, NLI is entitled to assert all rights and privileges that the FDIC would have been permitted to rely upon. Since the FDIC would have been entitled to rely on § 1825(b)(3) to

discharge the penalties assessed against the Subject Property during its Receivership, NLI may also rely on this provision in seeking to discharge the penalties. The failure to extend § 1825(b)(3) defenses to NLI undermines the entire purpose of FIRREA and highlights the problems raised by the conflict between the circuits on this issue. In fact, the congressional intent in creating FIRREA would be greatly frustrated if the FDIC's protections disappeared as soon as it sold its property interests.

CONCLUSION

THE PETITION SHOULD BE GRANTED BECAUSE (1) IMPORTANT QUESTIONS OF FEDERAL LAW HAVE BEEN DECIDED THAT HAVE NOT BEEN, BUT SHOULD BE DECIDED BY THE SUPREME COURT, AND (2) TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE PROTECTIONS OF FIRREA INURE TO THE BENEFIT OF ASSIGNEES.

Respectfully Submitted,



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June 23, 2000

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATIONAL LOAN INVESTORS, L.P.	:Docket No.
Plaintiff,	:3:97- CV- 01579
	:(DFM)
V.	:
	:New Haven,
TOWN OF ORANGE, ET AL.,	:Connecticut
	:February 12, 1999
Defendants.	:

EVIDENTIARY HEARING
BEFORE THE HONORABLE DONNA F. MARTINEZ
UNITED STATED MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service

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(Proceedings commenced at 11:07 a.m.)

THE COURT: We're here in National Loan Investors v. The Water Pollution Control Authority, 3:97-CV-1579.

May we have the appearances of counsel for the record ?

MR. URY: Yes, Your Honor. Frederick Ury for National Loan Investors.

MR. COLLERAN : John Colleran for Town of Orange Water Pollution Control Authority.

THE COURT: Good Morning, Counsel.

This case was tried to the court on July 31st 1998. I'm prepared to announce the Court's decision.

I make the following finding of fact:

The plaintiff, National Loan Investors, N.L.I., is a limited partnership organized and existing under the laws of Oklahoma and maintaining its place of business in Oklahoma.

The defendant, Water Pollution Control Authority, WPCA, is the municipal Water Pollution Control Authority for

the town of the Orange, Connecticut. It exists and operates in accordance with Connecticut General Statutes, section 7-246 et seq.

By a note dated June 23rd, 1989, Northeast Enterprises, Joseph Celentano, Joseph Delaney, Henry Maretz, the estate of Renzo Pierpaoli, and Arthur Sachs and Kalman A. Sachs promised to pay to the order of Connecticut Savings

Bank the sum of $850,000. That loan was secured by a certain parcel of property known as 95 Marsh Hill Road in Orange, Connecticut, hereinafter the "subject property."

Connecticut Saving Bank commenced a foreclosure action in the Connecticut state court to foreclose the mortgage on the subject property.

On November 14th, 1991 Connecticut Saving Bank was declared insolvent, and the Federal Deposit Insurance Company, FDIC, was appointed as receiver of Connecticut Savings Bank. The FDIC intervened as plaintiff, and on December 13th, 1991 removed the foreclosure action to this court.

NLI is an organization that acquires promissory loans from the FDIC and other entities across the country. NLI does not sell the loans, but holds them for its own account. If the loans are nonperforming, NLI forecloses on the loan.

In September of 1995, NLI bought the note for the subject property from the FDIC, at a so-called "Bidding Center."

Before buying the property NLI had no negotiations with the FDIC.

NLI'S witness at trial did not know if NLI performed any due diligence investigation before buying the note, and also did not know if NLI searched the land records to see if there were any liens or back taxes on the property.

The note on the subject property was in default when it was purchased. The FDIC had waived the deficiency. NLI was precluded from pursuing the deficiency because of the agreement with the FDIC.

In September 1995, the FDIC assigned the note and mortgage to NLI, and NLI then substituted itself as the plaintiff in the pending foreclose action.

On November 28th, 1995, NLI obtained a judgement of strict foreclose, and on January 15th,1996, title to the subject property vested in NLI.

As stipulated by the parties, neither Connecticut Saving Bank nor the FDIC ever took title to the subject property.

Replying on Connecticut General Statues, Section 7-249, the WPCA had levied an , assessment upon the subject property for a sewer construction project. The sewer assessment was in the principal amount of a $134 - - $134,400, and was to paid in annual installments. Interest on the sewer assessment, in the amount of 7.64 percent, also was

imposed. The rate of interest was the same as the interest on the bond that financed the cost of the sewer construction project.

The sewer assessment levied on the subject property by the WPCA was not paid from November 1st, 1991, through August 1997. The WPCA charged interest at the bond rate in

the amount of $100,186.63. The WPCA charged an additional amount of $135,575.40 against the property, from November 1st, 1997, to August 1997.

The plaintiff contest the payment of $114,127.57 of this additional charge. The $114,127.57 that the plaintiff contests is the amount levied during the time the FDIC was the receiver of the subject property; that is, the amount levied from November 14th, 1991, when the FDIC became the receiver for Connecticut Saving Bank, until September 1995, when the plaintiff purchased the note and mortgage from the FDIC.

Other than this contested amount, the plaintiff has paid all assessments and interest.

All of the charges, including the sewer assessment, interest and the contested additional charge were levry - - levied by the WPCA against the subject property, not against liens of the FDIC, the plaintiff or anyone else.

The WPCA property recorded each lien accruing against the subject property.

The plaintiff seeks a declaratory judgement pursuant

to 21 - - excuse me, pursuant to 28 U.S.C., Section 2201, declaring whether or nor NLI is liable for the contested charge.

I now turn to the law and to the arguments of counsel.

Based on 12 U.S.C., Section 1824 (b) (3), the

plaintiff argues that the contested charge is a penalty, and that because the penalty was assessed during the FDIC's receivership, NLI, as assignee of the FDIC, cannot be held liable for that amount.

The defendant argues that the additional amount is not a penalty, but rather it is interest properly charged under Connecticut General Statutes, Section 12-146.

The defendant also maintains that 12 U.S.C., Section 1825 (b) (3) is inapplicable to this case because the "additional charge" contested by the plaintiff was levied upon the subject property and not upon the FDIC's mortgage lien on that property.

First, the court finds that the contested charge cannot fairly be characterized as interest, and is, in fact, a penalty. As noted above, the WPCA already assessed and the plaintiff has already paid interest on the sewer assessments at the bond rate of 7.64 percent.

The contested charge was assessed pursuant to

Connecticut General Statues, Section 12-146, and consists of an additional 18 percent per annum on the principle, plus the bond interest.

There has been no evidence presented to this court which indicates that the additional charge bears any relation to actual losses incurred by the WPCA, when a property owner fails to pay a sewer assessment in a timely fashion. Instead,

the contested charge appears to be punitive in nature, intended not to compensate the WPCA for delay in payment, or for the use of money, but rather to punish delinquent taxpayers and discourage future delinquencies.

Next, the court consider the applicability of 12 U.S.C., Section 1825 (b) (3) to this case.

Twelve U.S.C., Section 1825 (b) (3) provides that when acting as a receiver, the FDIC:

"Shall not be liable for any amount in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate or recording tax, or any recording or filing fees when due."

"The FDIC enjoys sovereign immunity from state tax penalties to facilitate its reconsolidation of failed banks."

Citing, Irving Independent School District Fee Packard Properties, 970 F.2d 58, at 61 (5th Cir.) (1992).

In Irving the Fifth Circuit found that section

1835 (b) (3) does not extinguish liens which attach before the FDIC obtain ownership to a property, even to the extent that those preexisting liens secure penalties.

The court reasoned that where liens in place before the FDIC obtain ownership of a property, those liens do not cause a reduction in the value of the FDIC's interest.

As in Irving, the FDIC, in this case, did not own the property when the contested charge was levied, and thus, the charge is not extinguished by 12 U.S.C., Section 1825 (b) (3).

As the parties have stipulated, while the FDIC held a mortgage interest, it never owned or acquired title to the subject property, and as such, the FDIC was never liable for any of the charges which were assessed against the property by the WPCA.

Instead, because the contested charge was levied against the subject property itself, liability for that charge passed with the chain of title, directly from the Northeast Enterprise's Group to the plaintiff, National Loan Investors.

NLI appears to advocates a position that would - - I misspoke.

NLI advocates a position that would appear to allow any property owner who has a mortgage with failed bank, whether or not that mortgage is in default, to claim the same

immunity from all penalties assessed against his or her property, merely because the FDIC becomes the receiver for the bank.

The Court does not believe that such a result was contemplated by congress when it enacted the Financial Institutions Reform Recovery and Enforcement Act of 1989.

Accordingly, the court concludes that 12 U.S.C.,

Section 825 (b) (3) does not shield the plaintiff from liability for the contested charge which is assessed by the WPCA against the subject property, and not against the FDIC or any property which was owned by the FDIC.

Accordingly, the clerk shall enter judgment in favor of the defendant, pursuant to Rule 58 of the Federal Rules of Civil Procedure. It is so ordered.

THE COURT: All right. Thank you, gentlemen?

MR. URY: You'll - - would you please send us copy of your decision, Your Honor?

THE COURT: Take - - Take it up with our court clerk. Thank you.

MR. URY: okay.

THE COURT: Thank you.

(Proceedings concluded at 11:22 p.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

February 26, 1999

/S/
STEPHEN C. BOWLES

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATIONAL LOAN INVESTORS L.P. CIVIL NO. 3:97CV1579(DFM)

V.

TOWN OF ORANGE,
ARTHUR WILLIAMS and
WATER POLLUTION CONTROL
AUTHORITY

JUDGMENT

This matter came on for trial as to the plaintiff and the defendant, Water Pollution Control Authority, before the Honorable Donna F. Martinez, United States Magistrate Judge, after a Consent to Proceed Before a United States Magistrate Judge was filed on June 9, 1998. The case was voluntarily dismissed as to the defendant Arthur Williams on September 5,1997 and as to the defendant Town of Orange on October 27, 1997. At a hearing held on February 12, 1999, Findings of Fact and Conclusions of Law entered finding that judgment shall enter in favor of the defendant, Water Pollution

Control Authority.

Therefore, it is hereby **ORDERED** and **ADJUDGED** that the case is voluntarily dismissed as the defendants Arthur Williams and Town of Orange and that judgement is entered for the defendant, Water Pollution Control Authority.

Dated at New Haven, Connecticut this 16th day February, 1999.

KEVIN F. ROWE, Clerk
By /S/
Lori Inferrera
Deputy-in-Charge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 434, 827 - - August Term, 1999

(Argued: October 8, 1999 Decided: February 25, 2000)

Docket Nos. 99-7281, 99-7309

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NATIONAL LOAN INVESTORS L.P.,

Plaintiff-Appellant-Cross-Appellee,

-v.-

TOWN OF ORANGE; ARTHUR WILLIAMS,

Defendants,

WATER POLLUTION CONTROL AUTHORITY,

Defendant-Appellee-Cross-Appellant.

----------x

Before: JACOBS, CALABRESI, and SOTOMAYOR, Circuit Judges.

Appeal from a final judgment in the United States District Court for the District of Connecticut (Martinez, M.J.), ruling that the defendant Water Pollution Control

Authority did not violate the Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C. & 1825 (b) (3), when it assessed an additional fee for late sewer charges in respect of a period in which the property was mortgaged to a

bank for which the Federal Deposit Insurance Corporation was receiver.

Affirmed.

FREDERIC S. URY, Westport, CT (Deborah M.. Garskof, Ury & Moskow, L.L.C., on the brief), for Plaintiff-Appellant-Cross-Appellee.

JOHN W. COLLERAN, New Haven, CT (John W. Colleran , P.C., Jeffrey M. Donofrio, Ciulla & Donofrio, LLP, on the brief), for Defendant-Appellee-Cross-Appellant.

JACOBS, Circuit Judge:

One section of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") provides that the Federal Deposit Insurance Corporation ("FDIC"), when acting as a receiver, "shall not be liable for any amounts in the nature of penalties or fines." 12 U.S.C. § 1825(b)(3). The FDIC acted as receiver of an insolvent bank that held a mortgage on a parcel of land in Orange, Connecticut, which mortgage was sold by the FDIC to plaintiff National Loan

28 Investors, L.P. ("National Loan"). After effecting

29 foreclosure, National Loan paid various accrued sewer

30 charges and related charges imposed by defendant Water

Pollution Control Authority ("the Authority"), but brought suit in the United States District Court for the District of Connecticut (Martinez, M.J.), seeking a declaratory judgment that § 1825(b)(3) barred the assessment of an additional 18% charge for the time period in which the FDIC was receiver.

Following a bench trial, the district court concluded that the assessment was a penalty, but ruled nevertheless that the assessment did not violate 12 U.S.C. § 1825(b)(3), and that National Loan was liable for the $114,127.57 assessment because the FDIC never held title to the property.

On appeal, National Loan argues that the district court erred when it held that 12 U.S.C. § 1825(b)(3) allows the assessment of penalties with respect to property held by the FDIC as mortgagee.

The Authority cross-appeals, arguing that the district court erred in finding that the contested charge constituted a penalty. We agree with this argument, and affirm the judgment on the ground that National Loan failed to carry

its burden of showing that the contested assessment, or any part of it, was in the nature of a penalty.

BACKGROUND

Connecticut Savings Bank made a $850,000 loan to Northeast Enterprises and other parties ("Northeast"), evidenced by a note dated June 23, 1989, and secured by property at 95 Marsh Hill Road in Orange, Connecticut.

In 1990, the Town of Orange, acting through the Authority, assessed various properties, including 95 Marsh Hill Road, in order to pay for the installation of new sewer lines. The assessment against 95 Marsh Hill Road was in the principal amount of $134,400. Pursuant to Connecticut General Statutes § 7- 253, Northeast elected to pay the assessment in annual installments with interest of 7.64%, the interest rate on the bond that financed the sewer construction project.

Subsequently, Northeast defaulted on its loan from Connecticut Savings Bank, and state-court foreclosure proceedings were commenced. While the foreclosure action was pending, Connecticut Savings Bank was declared

19 insolvent. The FDIC was appointed receiver on November 14,
20 1991, intervened in the foreclosure action, and removed it
21 to federal court.
22 In September 1995, the FDIC sold its interest in the

property to National Loan, assigning to it the note and mortgage. National Loan substituted itself as plaintiff in the pending federal court foreclosure action, won a judgment of strict foreclosure, and took title to the property on January 15, 1996.

From November 1, 1991--around the time Connecticut Savings Bank became insolvent--through August 1997, no one paid the sewer assessment or the corresponding bond interest. During this period, interest accrued in the amount of $100,186.63. The Authority also levied an additional $135,575.40 charge amounting to a fee of 18% per year on principal and interest; a portion of that assessment is at issue on this appeal.

The Authority properly recorded each lien accruing against the property, and National Loan eventually remitted the arrears of installment payments and the bond interest, as well as the additional 18% charge, except for the period from November 14, 1991 (when the FDIC became the receiver for Connecticut Savings Bank) through September 1995(when

20 National Loan purchased the note and mortgage from the
21 FDIC), asserting that federal law barred the assessment
22 while the FDIC owned the mortgage. This unpaid charge

amounted to $114,127.57.

The Authority refused to waive the contested charge, and National Loan brought this action in the District of Connecticut, seeking a declaration that the additional fee could not be imposed for the period in which the FDIC held a mortgage interest in the property.

At the bench trial on July 31, 1998, the Authority characterized the charge as interest legitimately imposed for the late installment payments pursuant to Connecticut General Statutes §§ 7-254 and 12-146, while National Loan characterized the charge as a penalty prohibited by 12 U.S.C. § 1825(b)(3).

The district court found that the Authority had already assessed interest at the bond rate of 7.64%, and that there was no evidence indicating "that the additional charge bears any relation to actual losses incurred by the [Authority], when a property owner fails to pay a sewer assessment in a timely fashion." National Loan Investors, L.P. v. Town of Orange, No. 3:97-CV- 01579, Tr. of Evidentiary Hr'g at 6 (D.

20 Conn. Feb. 12, 1999). The district court therefore
21 concluded that the charge was "punitive in nature, intended
22 not to compensate the [Authority] for delay in payment, or

for the use of money, but rather to punish delinquent taxpayers and discourage future delinquencies." Id. at 7. Accordingly, the court held that the charge was a penalty of the kind for which the FDIC is not liable.

The court nevertheless concluded that the assessment of this penalty did not violate 12 U.S.C. § 1825(b)(3) because the FDIC's interest in the property was as mortgagee rather than as titleholder, and because the FDIC therefore "was never liable for any of the charges which were assessed against the property by the [Authority]." Id. at 8. "[B]ecause the contested charge was levied against the subject property itself," the district court decided that " liability for that charge passed with the chain of title, directly from [Northeast] to the plaintiff, National Loan Investors." Id. The district court cautioned that otherwise the statute "would appear to allow any property owner who has a mortgage with a failed bank, whether or not that mortgage is in default, to claim the same immunity from all penalties assessed against his or her property, merely

20 because the FDIC becomes the receiver for the bank." Id.

21 This appeal followed.

DISCUSSION

Section 219 of FIRREA, Pub.L. No. 101-73, 103 Stat. 183, 261, codified at 12 U.S.C. § 1825(b), strengthened the hand of the FDIC in its role as receiver for failed financial institutions. The provision is set out here in full:

> When acting as a receiver, the following provisions shall apply with respect to the [FDIC]:
>
> (1) The [FDIC] including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the [FDIC] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of such property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed.
>
> (2) No property of the [FDIC] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the [FDIC], nor

shall any involuntary lien attach to the property of the [FDIC].

(3) The [FDIC] shall not be liable for any amounts in the nature of penalties or fines, including those arising from the

> failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

12 U.S.C. § 1825(b).

A

The first question presented on this appeal is whether National Loan enjoys the exemption set forth in 12 U.S.C. § 1825(b)(3)--which provides that the FDIC "shall not be liable for any amounts in the nature of penalties or fines." We review the district court's interpretation of the statute de novo. See, e.g., United States v. Koh, 199 F.3d 632, 636 (2d Cir.1999).

Subsumed in that question are at least three others. But for the reasons that follow, we decline to answer them.

First: Does the FDIC enjoy its freedom from liability under § 1825(b)(3) when the FDIC is a mortgagee rather than the titleholder? The plain language of 12 U.S.C. § 1825(b)(3) does not speak in terms of particular interests in property. Section 1825(b) broadly states that

22 subsections (1), (2), and (3) shall apply when the FDIC is

23 acting as a receiver, and subsection (3) forecloses

24 liability for "any amounts in nature of penalties or fines,"

without qualification. The examples stated in subsection (3) include some obligations that only an owner would usually be required to pay, such as personal property taxes, but also includes obligations, such as recording or filing fees, which are also payable by a mortgagee. Accordingly, the penalties or fines prohibited by 12 U.S.C. § 1825(b)(3) are not linked explicitly or implicitly to any particular interests in property. On the other hand, § 1825(b)(3) speaks in terms of the FDIC's liability, and is arguably ambiguous as to whether the penalties accrue nevertheless and can be collected from someone else, such as the titleholder or that person's successors.

Second: Assuming that the FDIC as mortgagee did enjoy freedom from liability for penalties, does that dispensation inure to the benefit of its successors such as National Loan? Unless the benefit of the FDIC's exemption from liability inures to the benefit of its successors, the penalty assessment could potentially reduce the value of the FDIC's interest because the subject property would be sold

subject to the burden of penalties. That result would arguably impair the purpose of § 1825(b) to "reduce the charges connected to property [the FDIC] has acquired,"

thereby permitting the FDIC to "increase the value of the property, decrease its own losses, expedite resale, and save the nation's taxpayers and insured depositors a great deal of money." Irving Indep. Sch. Dist. v. Packard Properties, 970 F.2d 58, 62-63 (5th Cir.1992). Thus, the Seventh Circuit has ruled that an assignee "acquired whatever it was that [the receiver] held at the time of assignment, complete with whatever limitations on encumbrances [the receiver] enjoyed as a result of FIRREA." RTC Commercial Assets Trust v. Phoenix Bond & Indem. Co., 169 F.3d 448, 458 (7th Cir. 1999); cf. Federal Deposit Ins. Corp. v. Newhart, 892 F.2d 47, 50 (8th Cir.1989) (reaching similar conclusion with respect to 12 U.S.C. § 1823(e)). The answer to this question may not necessarily decide this appeal, however, because a further question would remain.

Assuming that National Loan, as successor to the FDIC, enjoys the FDIC's exemption from liability, does National Loan, post-foreclosure, bear the penalties as successor to the titleholder? The Seventh Circuit has answered in the

20 affirmative in a similar case, finding that while §

21 1825(b)(3) relieves receivers and their successors of

22 personal liability for penalties, it does not "eliminate the

liability of the property itself for the charges." Phoenix Bond, 169 F.3d at 458. The district court, thinking along the same lines, concluded that "because the [penalty] was levied against the subject property itself, liability for that charge passed with the chain of title, directly from the Northeast Enterprise's Group to the plaintiff, National Loan Investors." We decline to decide whether the district court's approach was correct, however, because the question is close, and, on this record, avoidable.

Moreover, the question may be more complicated than it was when it was presented to the district court. National Loan's reply brief on appeal argues, apparently for the first time: (i) that Connecticut is a "title state," in which a mortgagee acquires title to real property subject to the mortgagor paying off the promissory note; and (ii) that the FDIC as mortgagee therefore had title to the property subject to payment, contrary to the district court's premise that the charges were properly assessed against the property because the FDIC lacked title. At oral argument, both sides

20 agreed that Connecticut is a title state. However, while it

21 is possible that this feature of Connecticut law on

22 mortgages has some impact on the analysis, it is not clear

what that impact is. Neither party has fully briefed the issue on appeal, and the issue was never presented to the district court. Indeed, the district court decided the case on a set of stipulated facts, including that "neither Connecticut Savings Bank nor the FDIC ever took title to the subject property." National Loan Investors, L.P. v. Town of Orange, No. 3:97-CV-01579, Tr. of Evidentiary Hr'g at 4 (D. Conn. Feb. 12, 1999). Because we can resolve this case on another ground, we proceed to do so, and leave these three questions undecided.

B

We hold that the exemption of § 1825(b)(3) is unavailable to National Loan in this case because, notwithstanding National Loan's concession at oral argument that it bore the burden of establishing at trial that the contested charge was a penalty, it failed to do so. (Neither party briefed the issue.)

The Authority imposed the contested charge pursuant to

Connecticut General Statutes § 7-254, which provides in relevant part that:

> Any assessment of benefits or any instalment thereof, not paid within thirty days after the due

> date, shall be delinquent and shall be subject to interest from such due date at the interest rate and in the manner provided by the general statutes for delinquent property taxes. Each addition of interest shall be collectible as a part of such assessment.

Conn. Gen.Stat. § 7-254(a) (emphasis added). The section of the Connecticut General Statutes that governs the interest charge at issue on this appeal is § 12-146, which defines a "tax" as "each property tax and each instalment and part thereof due to a municipality as it may have been increased by interest, fees and charges," and sets the interest rate at 18%:

> [T]he delinquent portion of the principal of any tax shall be subject to interest at the rate of eighteen per cent per annum from the time when it became due and payable until the same is paid . . . . . Each addition of interest shall become, and shall be collectible as, a part of such tax. Interest shall accrue at said rate until payment of such taxes due notwithstanding the entry of any judgment in favor of the municipality against the taxpayer or his property.

§ 12-146.

The Connecticut statute thus characterizes the contested charge as "interest" or a "tax," while the

29 Authority's billing form characterizes the charge as a

30 penalty. Neither characterization is dispositive. See

31 Town of Monroe v. 837 Main St. Corp., 45 Conn. Supp. 283,

291, 712 A.2d 996, 1000 (1997) ("In evaluating this issue, the court appreciates the view that although a legislative body may label a pecuniary charge as being interest, the charge may nevertheless be so excessively onerous either in a general sense or within the meaning of 12 U.S.C. § 825(b)(3) that the legislative designation must be rejected and the charge must be viewed as a penalty.").

Whether a charge constitutes a penalty for purposes of § 1825(b)(3) is a federal question informed by state law. See Irving Indep. Sch. Dist. v. Packard Properties, 741 F. Supp. 120, 123 (N.D.Tex.1990) (citing Reconstruction Fin. Corp. v. Beaver County, Pa., 328 U.S. 204, 207-10 (1946)), aff'd, 970 F.2d 58 (5th Cir.1992); see also Phoenix Bond, 169 F.3d at 457 (following Irving). The Superior Court of Connecticut has construed § 12-146 and held that assessments of the kind at issue in this case are not in the nature of penalties because, among other reasons, the 18% rate "was imposed primarily to ensure that municipalities receive fair compensation for delayed payment of taxes in light of

20 fluctuating market rates, inflation, and collection costs."

21 Monroe, 45 Conn.Supp. at 292, 712 A.2d at 1000.

22 Informed by state law, we are inclined to agree with

the Monroe court's conclusion.

The purpose of a penalty (in the present context) is to serve as an incentive to prompt payment. See Phoenix Bond, 169 F.3d at 457 ("States do not assess penalties for the purpose of raising revenue; they assess them so that delinquent tax debtors will be deterred the next time around from ignoring their legal obligations."); Irving, 970 F.2d at 64 (distinguishing "penalties imposed for delinquency or failure of duty, and all enacted in aid of the state's revenue" from "charges made by the state for the use or detention of its money") (internal citations and quotation marks omitted). Obviously, a percentage surcharge in any amount on an unpaid obligation can be characterized as an inducement to payment, and the higher the surcharge, the greater the inducement. In this case, it is safe to say that the assessment is not a penalty to the extent, if any, that it compensates the Authority for the loss of use of money caused by non-payment. (Compensation for other kinds of losses may or may not be penalties.)

Because Northeast elected to pay the sewer assessment over time rather than by lump sum without delay, Northeast (and its successors) incurred a 7.64% interest charge

corresponding to the interest that the Town of Orange, through the Authority, was obligated to pay on the bonds it issued to finance the sewer system. See Conn. Gen.Stat. § 7-253. These assessments have been collected. Yet it is clear that even so, the Town was less than fully compensated. We assume that unless the Town defaulted on its bond, the Town was forced to make the principal and interest payments from some source of revenue or credit, and thereby incurred an expense or other detriment for the use of the money. Therefore, at least some portion of the disputed 18% charge compensates the Authority for the use of money during the period of non- payment.

The Authority did not undertake at trial to justify the 18% charge as compensatory; at the same time, National Loan did not undertake to show by what margin, if any, the assessment of the 18% charge operates as a penalty. Here, it is agreed that it was National Loan's burden to show, in the totality of the circumstances, that the disputed charge, in whole or in some measurable part, was imposed for

purposes other than compensation, and was punitive in nature.

Accordingly, we conclude that National Loan failed to

shoulder its burden of proving that the Authority imposed a penalty on 95 Marsh Hill Road during the FDIC's receivership. National Loan therefore is unable to invoke the exemption embodied in 12 U.S.C. § 1825(b)(3), and must pay the contested charge in full. We express no view, however, as to whether, on another record, charges imposed under § 12-146 might be shown to be a "penalty" within the meaning of § 1825(b)(3).

CONCLUSION

The judgment of the district court is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Second Circuit
United States Court House
40 Foley Square
New York 10007

Roseann B. Mackechine
Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31 day of March two thousand.

Present:

Hon. Jacobs

Hon. Calabresi

Hon. Sotomayor

CIRCUIT JUDGES

National Loan

Plaintiff-Appellant

v

Docket No. 99-7281

Water Pollution Control

Defendant-Appellee

A petition for panel rehearing having been filed herein by Appellant National Loan Investors, L.P.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B.MACKECHNIE, Clerk

By:_____/S/_____
Beth J.Meador, Administrative Attorney

APPENDIX D

UNITED STATES CODE ANNOTATED

TITLE 12. BANKS AND BANKING

CHAPTER 16--FEDERAL DEPOSIT INSURANCE CORPORATION

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Current through P.L. 106-180, approved 3-17-2000

§ 1825. Issuance of notes, debentures, bonds, and other obligations; exemption from taxation

(a) General rule

All notes, debentures, bonds, or other such obligations issued by the Corporation shall be exempt, both as to principal and interest, from all taxation (except estate and inheritance taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority: Provided, That interest upon or any income from any such obligations and gain from the sale or other disposition of such obligations shall not have any exemption, as such, and loss from the sale or other disposition of such obligations shall not have any special treatment, as such, under the Internal Revenue Code, or laws amendatory or supplementary thereto. The Corporation, including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

(b) Other exemptions

When acting as a receiver, the following provisions shall apply with respect to the Corporation:

(1) The Corporation including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of such property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed.

(2) No property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation.

(3) The Corporation shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

This subsection shall not apply with respect to any tax imposed (or other amount arising) under Title 26.

(c) Limitation on borrowing

(1) Cost estimate for outstanding obligations, guarantees, and liabilities

As soon as practicable after August 9, 1989, the Corporation shall estimate the aggregate cost to the Corporation for all outstanding obligations and guarantees of the Corporation which were issued, and all outstanding liabilities which were incurred, by the Corporation before such date.

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